

October 7, 2026

Lee Zeldin, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (1101A)
Washington, DC 20460

RE: ADEQ Comments on Supplemental Notice of Proposed Rulemaking, Updated Definition of "Waters of the United States"; Docket ID No. EPA-HQ-OW-2025-0322

Administrator Zeldin:

The Arizona Department of Environmental Quality (ADEQ) appreciates the opportunity to submit these comments regarding the Supplemental Notice of Proposed Rulemaking (SNPRM) defining "waters of the United States" (WOTUS)¹ released on September 9, 2026, by the U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Army, Corps of Engineers' (USACE) (collectively, "the Agencies").

ADEQ commends the efforts by the Agencies to develop a durable WOTUS definition. However, ADEQ submits these comments to highlight the evidentiary, technical, and administrative challenges associated with implementing this rule in an arid state, such as Arizona. The Agencies acknowledge that the proposed rule could significantly reduce federally jurisdictional waters in the West², while also recognizing limitations in reliably quantifying the baseline³ needed to evaluate those impacts.

I. Evidentiary Challenges

Sackett v. EPA established that the Clean Water Act (CWA) covers "relatively permanent, standing or continuously flowing bodies of water."⁴ This formulation builds upon the *Rapanos* plurality opinion, which clarified that the term "relatively permanent" "does not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but have no flow during dry months."⁵ While the SNPRM cites this footnote, it goes on to define perennial in a manner that excludes seasonal rivers which maintain continuous flow for multi-month periods.⁶

¹Updated Definition of "Waters of the United States," 91 Fed. Reg. 57,284. (SNPRM)

²*Id.* at 57,298.

³*Id.* at 57,297.

⁴*Sackett v. Env'tl. Prot. Agency*, 598 U.S. 651, 671 (2023) (quoting *Rapanos v. United States*, 547 U.S. 715, 739 (2006) (plurality opinion)).

⁵*Rapanos v. United States*, 547 U.S. at 732 n.5 (plurality opinion) ("Common sense and common usage distinguish between a wash and seasonal river.").

⁶See SNPRM at 57,289, 57,291 (a water lacking flow "from June through August (approximately 90 days) every year" would not be relatively permanent).

Instead the SNPRM defines “relatively permanent” waters as “perennial” waterbodies with continuous daily flow during ordinary conditions,⁷ and that temporary flow interruptions cannot exceed 30 consecutive days per year to retain jurisdiction.⁸ The preamble notes “there are no precise, scientifically-grounded, nationally consistent time limits” for flow interruptions, stating that 30 days was selected because it represents “roughly the length of a month.”⁹

Approximately 95% of Arizona stream miles likely fail the continuous flow standard in this SNPRM.¹⁰ Outside the Colorado River, Arizona’s major river systems contain non-“perennial” segments with flow interruptions that routinely extend beyond 30 consecutive days during the dry seasons. The impact on Arizona Pollutant Discharge Elimination System (AZPDES) Individual Permits, the most complex CWA permit, is substantial. Out of a total of 123 Individual CWA discharge permits, it is likely only 13 permits would remain under this rule. The broader operational disruption to general permits will be equally significant. These jurisdictional changes would extend beyond permit administration. They could create uncertainty for Arizona communities, businesses, and public infrastructure regarding which waters remain federally regulated and which protections must instead be addressed through state programs. For communities throughout Arizona, particularly those dependent on limited and highly variable water resources, a clear and workable regulatory framework is essential to protecting water quality while supporting responsible economic development.

Further, while the SNPRM maintains jurisdictional status for interruptions of flow during drought conditions, it is only if drought intensity reaches “extreme” or “exceptional” levels in the U.S. Drought Monitor, capped at a maximum of five consecutive years. The preamble references the standard five-year expiration period for USACE jurisdictional determinations as the basis for this temporal limit.¹¹ After five years, conditions are treated as the baseline, removing jurisdictional status.¹²

The SNPRM does not identify a clear scientific or technical basis for the proposed 30-day and five year thresholds. ADEQ recommends that the Agencies provide additional rationale for these thresholds and consider whether they adequately account for the hydrologic conditions of arid states.¹³

II. Technical Challenges

⁷*Id.* at 57,288, 57,301

⁸*Id.* at 57,288 (“[I]f flow is interrupted for two periods in any given year, and each period consists of 10 consecutive days of no flow, the water body would not be jurisdictional.”).

⁹*Id.* at 57,290.

¹⁰ Jason P. Julian et al., *What Is Relatively Permanent? Flow Regimes of Arizona Streams Within the Context of the 2023 Conforming Rule on the Revised Definition of “Waters of the United States,”* 16 *Water* 2641 (2024), <https://doi.org/10.3390/w16182641>; see also Lainie R. Levick et al., U.S. EPA, *The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest*, EPA/600/R-08/134 (2008).

¹¹SNPRM at 57,290 (citing Regulatory Guidance Letter 05-02).

¹²*Id.* at 57,290-91.

¹³*FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

The SNPRM states that the proposed rule does not mandate continuous physical monitoring.¹⁴ However, verifying that a flow interruption does not exceed a single 30-consecutive-day period per year¹⁵ requires continuous annual flow data. As a result, this standard creates an impossible monitoring burden because existing monitoring infrastructure across arid regions lacks coverage to generate daily flow datasets for the majority of surface waters.¹⁶

In response to the November 20, 2025, Notice of Proposed Rulemaking (NPRM), ADEQ submitted technical recommendations addressing these regional data limitations.¹⁷ Specifically, ADEQ developed a multi-factor weight-of-evidence methodology to determine flow regimes by incorporating physical, biological, and hydrologic indicators alongside flow data where available.¹⁸ By establishing flow regimes, ADEQ can appropriately assign surface water quality standards while simultaneously providing jurisdictional clarity. This field-tested framework provides a practical standard for evaluating relatively permanent waters without creating unresolvable monitoring requirements in data-sparse regions.

ADEQ encourages the Agencies to consider state-developed methodologies, including ADEQ's weight-of-evidence approach, when addressing flow-data limitations in the arid West.¹⁹

III. Administrative Challenges

The SNPRM notes state programs "would be free to address" waters falling outside federal CWA jurisdiction.²⁰ However, the Agencies acknowledge an inability to quantify baseline costs²¹ and omit real-world impacts on state frameworks.²² For Arizona, the impact is significant with potentially 95% of the surface waters currently regulated under the CWA eliminated in one rule change. Given the potential scope of these changes, ADEQ recommends additional federalism consultation focused specifically on implementation impacts associated with the SNPRM.²³

Additionally, Arizona's administrative history illustrates the practical constraints associated with reliance on state-level legal frameworks. In 2021, the Arizona legislature authorized the state Surface Water Protection Program (SWPP) to protect critical surface waters no longer regulated under the CWA.²⁴ During rulemaking to

¹⁴SNPRM at 57,290, 57,292, 57,296.

¹⁵*Id.* at 57,301.

¹⁶Letter from Karen Peters, Dir., Ariz. Dep't of Env'tl. Quality, to Lee Zeldin, Adm'r, U.S. EPA (Jan. 5, 2026) (Docket ID No. EPA-HQ-OW-2025-0322); see Updated Definition of "Waters of the United States," 90 Fed. Reg. 52,498 (proposed Nov. 20, 2025).

¹⁷*Id.* at 4.

¹⁸*Id.* at 4.

¹⁹SNPRM at 57,286-88.

²⁰*Id.* at 57,290.

²¹*Id.* at 57,297-98.

²²*Id.* at 57,299.

²³*Id.* at 57,300.

²⁴Ariz. Rev. Stat. Ann. §§ 49-221(G), 49-255.04, 49-255.05.

implement SWPP, ADEQ determined 33 waters in the federal program were non-WOTUS, but required protection under SWPP.²⁵ ADEQ worked with the Agencies and submitted non-WOTUS evaluation reports for informal review prior to completing state rulemaking to remove the waters from the federal program.²⁶ CWA Section 303(c) requires approval within 60 days (or disapproval within 90 days) for federal program modifications submitted to EPA.²⁷ Since ADEQ submitted these changes in August 2024, EPA review remains pending, which continues to affect the full implementation of SWPP. Arizona's experience demonstrates that a reduction in federal jurisdiction does not eliminate the need to protect important surface waters; instead, it shifts greater responsibility to the state. That transition requires sufficient time, resources, and federal coordination to avoid gaps in protection and regulatory uncertainty for Arizona communities and regulated entities.

These multi-year delays demonstrate that CWA jurisdiction cannot be isolated to the WOTUS definition alone, as it directly intersects with statutory implementation under CWA §§ 303(c), 303(d), 402(b), and 106/319.²⁸ When federal processing stalls across these interdependent provisions, state programs and the regulated community are left in regulatory limbo. Effective regulatory administration requires timely processing of state standards and clear framework integration to ensure program continuity.²⁹

IV. Specific Recommendations

ADEQ urges the Agencies to consider the practical consequences of the proposed approach for arid states. Arizona needs a regulatory framework that provides clarity for communities and regulated entities, protects important water resources, supports responsible economic activity, and remains technically workable and consistent with the statutory limits established by *Sackett*. Accordingly, ADEQ recommends the following:

First, replace the proposed 30-consecutive-day temporal snapshot with a data-scalable, multi-factor weight-of-evidence framework in the final rule or accompanying guidance. This approach accounts for regional climatic and hydrologic realities by incorporating physical, biological, and hydrological indicators alongside available streamflow data in evaluating “relatively permanent” waters without imposing continuous-monitoring burdens in data-sparse regions.

Second, if the Agencies proceed with this rule, ADEQ recommends that they provide adequate federal funding, resource support, and detailed implementation guidance to enable states to manage this regulatory shift effectively. This should be completed through dedicated, state-specific federalism consultations outside of this 30-day public

²⁵SWPP NFRM, 29 Ariz. Admin. Reg. at 302; Ariz. Admin. Code § R18-11-216 (Tables A, B, and C).

²⁶Ariz. Dep't of Env'tl. Quality, *DRAFT ADEQ Jurisdictional Evaluations* at 8.

²⁷33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.21(a).

²⁸33 U.S.C. §§ 1256, 1313(c)-(d), 1342(b).

²⁹SNPRM at 57,292.

comment window to evaluate real-world impacts, resolve administrative integration challenges, and prevent program disruption.

Sincerely,

DocuSigned by:

72DC0E312D584BF...

Karen Peters

Director | Arizona Department of Environmental Quality